Risk Alert Bulletin

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GENERAL MANAGER'S COLUMN

I hope that you have all returned to the office refreshed and ready to cope with the cut and thrust of practice.

We made several changes to the bulletin last year. We introduced the more user-friendly format with pre-punched holes for easy filing and a more eye- catching presentation. We have made every effort to carry out our Chairman, Igna Klynsmith's wish to become more accessible to the profession, by introducing some regular columns like the "Useful Tips for MVA Practitioners" and "Letters to the Editor."

In the same vein, this year we hope to produce the bulletin in both English and Afrikaans so that it is more accessible to a wider number of practitioners. We are also preparing to launch our very own AIIF website, which will contain, *inter alia,* current and past copies of the bulletin, so watch this space for details.

Once again, we appeal to practitioners to keep us informed of any new risk-related developments that they become aware of, so that their colleagues can be advised through the bulletin.

Finally, I also welcome our two new team members who joined us late last year. They are:

Malcolm Padayachee

Malcolm is an admitted attorney who obtained his B. Proc and LL.B degrees at the University of Natal, Durban. He was employed at the Road Accident Fund for a period of two years. He thereafter served his articles of clerkship and practised as a professional assistant at Dudley Honey Incorporated until September 2002, before joining the team at Glenrand MIB as a legal adviser.

Sarah-Lee Engelbrecht

Sarah- Lee completed her BLC and LL.B degrees at the University of Pretoria and was admitted as an attorney in February 1998. She further obtained a "Certificate in Deceased Estate Practice" from UNISA during 1999. She practised as an attorney at Lourens Inc. for nearly five years before joining the team at Glenrand MIB as a legal adviser.

Ann Bertelsmann, General Manager
abertelsmann@glenrandmib.co.za

POLICY QUERIES

I received a letter of Demand on 11 November 2002 and reported the claim immediately. I note that you have registered the matter in the 2002\2003 year and that you have advised me that my deductible is R36 000-00. I am a single practitioner and my deductible should therefore be R20 000-00.

There were 2 partners in your practice in 2000, when your client's claim became prescribed. Please note that clause 8.5.1 of the policy states that,

> *" The deductible is determined by the number of partners or directors of the firm...on the date on which the event or occurrence occurred which gives rise to a claim..."*

The claim has been registered in the year in which the claim against you was first made. See also clause 1.1 of the policy.

Ann Bertelsmann, General Manager
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PASSENGER FOR REWARD?

Road Accident Fund v Samela (2002) 2 All SA 158(A)

Here the court had to consider whether the respondent ("S") fell within the definition of "passenger for reward' where the minibus in which she was travelling operated outside it's permitted area.

FACTS:

S was injured whilst she was a fare-paying passenger in a minibus, which had overturned solely due to the negligence of the driver. The owner of the minibus held a valid permit issued in terms of the Road Transportation Act 74 of 1977 at the time of the accident, but was operating outside the designated area in terms of the permit.

It was common cause between the parties that S's claim was limited to R25 000-00. However, S contended that he was conveyed for reward and therefore entitled to general damages. The RAF contended that, because the minibus was operating outside the designated area, any reward paid by S rendered the conveyance illegal. S was therefore only entitled to R25 000-00 in respect of certain categories of loss, *excluding* general damages.

In arguing that S was not a passenger conveyed for reward, the Fund contended that the reward should be disregarded because it contravened S 31(1) (b) of the Road Transportation Act 74 of 1977.

HELD

The court held that payment of a reward was a pre-condition to be satisfied before a contravention in term of SS 31(1)(a) or (b) of the Road Transportation Act could be considered. The latter subsection required the further illegal act of transgression of the permit. What rendered the conveyance unlawful was therefore the *non-compliance with the permit and not the payment of the reward.*

The Appeal was dismissed with costs.

COMMENT

We receive a large number of claims where clients allege that their attorney has under-settled their claim with the Road Accident Fund.

In view of the above decision, and in order to avoid such a claim being made, practitioners are urged to note that a claimant will be entitled to both general and special damages, where the claim is limited in circumstances similar to *Samela.*

TRUSTEES

TRUSTEE'S AUTHORITY TO ACT AS SUCH- PART 2

Kriel v Terblanche NO 2002 (6) SA 132 (NC)

INTRODUCTION

In our August 2002 bulletin, we highlighted the case of *Van der Merwe v Van der Merwe en Andere* 2002(2) SA 519 C, in which the court held that any agreement entered into by a trustee before his/ her having been authorized in writing by the Master, in terms of S6 (1) of the Trust Property Control Act 57 of 1988, is void and that such agreement cannot later be ratified by the Court.

We have had much feedback since the publication of our abovementioned article and in particular, attorneys have queried how transactions could be treated where the trust has not been formed and the property is to be bought before the Master has issued his letter of authority. (See Risk Alert Bulletin 4/2002, *"Letters to the editor")*

In the recent decision of *Kriel v Terblanche NO,* the court had to consider whether the abstract system of transfer of ownership was applicable in South Africa.

FACTS

The applicant, a retired farmer, wished to transfer his farm to his grandchildren and was therefore advised (from a tax point of view) to form a trust, to which the property could then be sold.

The Heuningkop trust was subsequently formed on **6 March 1995,** the trustees of which were the Applicant's son (the "7th Respondent) and his daughter- in- law. The Applicant (Seller) and the 7th Respondent in his capacity as trustee of the trust (Purchaser) signed the Deed of Sale on the same day. Authorization by the Master in terms of S6 (1) of the Trust property Control Act was only issued to the 7th Respondent and his wife on **14 March 1995.** Transfer of the property was registered on **31 July 1995.**

On **6 December 1999,** the trustees entered into a further agreement whereby the farm was sold to the 3rd, 4th and 8th Respondents as trustees of the Johan and Ina Trust. However, before registration, the Heuningkop trust was sequestrated and on **26 June 2000,** the 7th respondent was also sequestrated. On **11 October 2000,** the 1st respondent was appointed as curator of the trust and transfer was registered in favour of the Johan and Ina trust.

The applicant sought an order declaring:

i. the first sale agreement on **6 March 1995** to be void *ab initio*

ii. the corresponding registration to be void

iii. that ownership in the property should still vest in him

The applicant argued that the 1st sale agreement was void because at the time of conclusion, the 7th respondent did not have the necessary authority in terms of S6 (1) of the Act.

Consequently all further transactions after the contract was concluded were void especially in terms of the decisions of *Simplex (Pty) Ltd v Van der Merwe and others NNO* 1996(1) SA 111W and *Van der Merwe (as cited above)*

The respondents acknowledged that the sale agreement was void because of lack of authority, but argued that the above two decisions are not authority for the fact that *all* transactions concluded after the sale agreement were void. In support of this, it was argued that we have an abstract system of transfer of ownership, so even if the underlying contract is invalid, if transfer has taken place, the transfer itself will be valid. Further that when registration took place on **31 July 1995,** the 7th Respondent and his wife had already been appointed as trustees.

HELD

We have an abstract system of transfer of ownership of property in South Africa, therefore in terms of this theory; the legal ground, giving rise to delivery does not play a role. It is therefore irrelevant if the causative legal act is defective. All that is required is a serious intention to transfer and receive ownership.

CONCLUSION

The above decision does assist to a certain extent in answering the query as to how transactions could be treated where the trust has not been formed and the property is to be bought before the Master has issued his letter of authority.

However, practitioners are still warned to examine the circumstances of each transaction until a definitive decision has been made by the A.D.

USEFUL TIPS
FOR MVA practitioners

i. When instructed by several clients, who were all passengers in the same vehicle and whose claims are limited in terms of art 46 read with art 40 of the MMF Act 93 of 1989 (S18 read with S17 of the RAF Act 56 of 1996), always note that the limitation applies to each individual third party. *Each client* is therefore entitled to a claim limited to R25 000-00.

   More importantly, however, the same applies to each dependant of a deceased passenger who can claim to a maximum of R25 000-00 individually.

ii. If your client and\ or witnesses give you the registration number of the insured vehicle, it is then your duty to identify the driver and\or owner of the vehicle. However, if it is clear after doing a registration search that the vehicle is not in accordance with the description given by your client and\or witnesses, then you should consider the claim to be a Regulation 2 claim (i.e. "hit & run") and lodge within two years.

iii. " If you receive initial instructions from a client to act, but thereafter experience difficulties in contacting the client for further instructions and \or funds, it is important to remember that once an attorney- client relationship arises, it is your duty to ensure that:-

   - Important communications reach your client *(if necessary tracing agents should be instructed).*
   - Your client is aware of the consequences of inaction on his part, especially with regard to the time periods and legal consequences of prescription.

PRESCRIPTION

i. Prescription with regard to costs only starts to run once the amount of the legal costs has been agreed to by the parties or after the taxation of the bill. *(Santam Limited vs Ethwar* 1999(2) SA 244 (SCA)

ii. Prescription starts to run as soon as the "debt is due." Even if there is no quantifiable loss at this stage, prescription will still begin to run. In order to protect his client's (the creditor's) rights, an attorney can apply to court for a "declaration of rights" and thereby interrupt prescription.
   (Harker v Fussel & Another 2002(1) SA 170 T).

CONVEYANCING

We list hereunder the second article in our series of risky areas in Conveyancing practice.

i. Incorrect advice given to purchaser/seller e.g. failure to advise purchaser not to begin improvements on the property prior to transfer.

ii. Creation of a conflict of interest situation, when acting for both the seller and purchaser.

   Transferring attorneys are duty bound to safeguard the legitimate interests of both purchaser and seller, especially when one of the parties is not represented. The amount paid in by the purchaser should remain in an interest-bearing account for the benefit of the purchaser pending the transfer of the property.

iii. Use of bridging finance companies/ Furnishing of undertakings and the implications thereof

   Attorneys should not give undertakings that transfers will go through, especially when any number of things may prevent a transfer from being registered. By giving such undertakings to these bridging finance companies, attorneys place themselves and insurers at risk. It is further debatable as to whether such conduct can be classified as part of a Conveyancer's practice.

iv. Failure to ensure that security is in place e.g. registration of bonds or suretyship agreements.

v. Inadequate supervision of paralegals

Proper supervision should always be exercised over paralegals and administrative staff. Wherever possible, cheques should not be signed by partners not dealing with the file unless the full facts pertaining to the matter are disclosed at the time. An efficient accounting system should always be in place.

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LETTERS TO THE EDITOR

Dear Editor
Re: Risk Alert 4\2002- a claimant's common law claim

I always read your Risk Alert bulletin with interest.

In your most recent one, you deal with the situation where the client's claim is limited to R25000-00, and you (quite correctly) suggest that in those circumstances the attorney should always consider the possibility of a common law claim, notwithstanding that in most instances that will transpire not to be economically feasible.

When dealing with the situation where the client instructs the attorney not to proceed with the common law claim " because the driver\owner is a friend\family member" you didn't mention the need to consider - and explore with the client - the possibility that the family member might be insured. To my mind, that is something that the reasonable attorney should always canvass with the client. The latter might not want to sue his\her friend\ family member if they are uninsured, but might have no compunction about doing so if they are insured. Note the following instructive comment of Donaldson J. (as he then was) in *Forney v Dominion Insurance Co. Ltd* (1969) 1 Li. Rep. 502(Q). It reinforces the fact that an attorney should advise his\her client to consider suing a friend or relative who is insured:

" In due course an inquest was held and it then became apparent that while Mr. Bailey may well have been a most careful driver in the ordinary course of events, in this case it was he and not the other driver who was to blame. Miss Tomlinson therefore advised that all concerned (passengers in Mr. Bailey's car, being his wife, infant son and a friend, Mrs. Perry) had claims against the estate of Mr. Bailey and she explained that as Mr. Bailey was insured the family need have no scruples over enforcing these claims... "

Editor's note

" We thank our esteemed contributor and urge practitioners to always explore the possibility that the friend\family member may be insured."

2. The following letter was received by a firm of attorneys in Cape Town and brought to our attention.

The purpose of this letter is to invite you to participate in a business proposition which would give both of us financial gratification. Two years ago, several contracts were awarded and executed from my Ministry by numerous foreign firms and most of the contract sums were over- invoiced and inflated to our benefit by these firms with the aid of our officials who approved them.

The fact of the matter is that after paying all these contractors we fortunately have a surplus of $24,560,00.00 (twenty-four million five hundred and sixty thousand US dollars). After six months of balancing all our financial papers, the surplus is still outstanding.

My colleagues and I have now decided to move this surplus money abroad, but we must have a foreign partner who would provide us the avenue to safely and without suspicion transfer the $24,560,00.00. For us to successfully transfer the money into your bank account we would include your company into the original contract (which is directly under my control). This would give us the stance to make a claim for the $24,560,000.00. If this proposal interests you, we will be obliged and would offer you 25% of the remittance. We would put aside 5% to cover all expenses, while 70 % will be for us.

Note that on no account should you send us any correspondence by post or any courier services for security reasons. Please treat this information as very confidential and reply only by way of fax or my private e- mail as shown above.

Editor's note

The attorneys so approached quite rightly refused to accede to the request.

In our February 2002 edition we also dealt with the *Van Hulsteyns* matter (1999 (2) All SA 29 (T) where the Supreme Court of Appeal found that the attorneys were liable to the drawer (the Government of the RSA) of the stolen cheque.

Attorneys are therefore once again warned against unwittingly allowing their trust accounts to be conduits for fraudulent scams and money-laundering activities, as the original drawer of the cheque may at a later stage, hold them liable for damages.

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Please note that the Risk Alert Bulletin is intended to provide general information to practising attorneys and its contents are not intended as legal advice.

ANN BERTELSMANN
GENERAL MANAGER